

SENATE BILL 605

By Woodson

AN ACT to amend Tennessee Code Annotated, Title 68,
Chapter 203 and Title 69, Chapter 3, relative to
water pollution control.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 69, Chapter 3, is amended by adding Sections 2 through 10 of this act as a new part thereto.

SECTION 2. This act reduces the burden on the taxpayers for permit processing and enforcement of the Water Quality Control Act and permit requirements. The burden is shifted to those who create a need for enforcement and increased monitoring due to noncompliance with the law. The general assembly declares that the regulated community has an interest also in the prompt and efficient processing of permits. This process is delayed when resources are diverted or applied to monitoring of or enforcement against noncompliant permit holders. Significant resources are required to identify and document violations of the Water Quality Control Act and bring enforcement actions to compel compliance and protect the waters of the state. This act creates separate permit tracks for priority applicants that have a history of compliance and for other applicants with negative or no histories.

SECTION 3. Priority applicants may apply for general or individual permit coverage as required by law and shall pay applicable fees for permits as approved by the water quality control board. These fees may change periodically to reflect the actual cost of permit processing. Priority applicant permits are subject to standard site checks and self-monitoring as required by law. Individual probationary permits shall be available for all other eligible applicants.

SECTION 4.

(a) Applicants applying for the first time or with a documented history of non-compliance with permits during or after the permitted activity may be issued individual probationary permits. A documented history on non-compliance shall be two (2) or more enforcement actions initiated within a three hundred sixty-five (365) day period or four (4) notices of violation for the same or similar violation.

(b) Probationary permits shall include at least the following:

(1) A site check by qualified department personnel to ensure that erosion controls are built and implemented according to the current stormwater pollution prevention plan or other permit requirements and express, documented permission from the state to begin work. No grading or site preparation can commence prior to receiving written permission from the commissioner;

(2) Site checks by qualified department personnel for each phase of construction to assess the sufficiency of erosion controls and expressly approve the next phase;

(3) Random, unannounced site checks by qualified department personnel for erosion control compliance;

(4) Electronic submission of weekly site self-monitoring reports conducted by erosion control personnel certified by the state of Tennessee;

(5) Water quality testing of all affected streams during a storm event before, during and after construction; and

(6) An erosion prevention and remediation bond if the project impacts a 303(d) listed stream or tributary to a 303(d) listed stream. As reflected in the 305(b) report on the condition of surface waters and 303(d) list of waters that do not meet minimum standards due to pollution, sediment is the most common pollutant of waters of the state which are held in the public trust. When permitted

activities contribute to the pollution, the taxpayers and state and local government agencies lose the significant investment Tennessee has made to recover these resources. The bond covers the additional cost state and local officials will have to expend to repair damage to waters of the state.

(c) Applicants shall post an erosion bond prior to the issuance of the permit. An erosion bond shall guarantee that best management practices constructed under the permit will be adequately sized and maintained throughout the life of the bonding period. All bond defaults shall be paid to the local or state issuing authorities having the power to call on all or any part of the bond if an applicant does not comply with the act or with the conditions of the permit.

(d) The Board shall adopt regulations for the bond program which shall include:

- (1) Establishment of the total dollar amount required for the bond;
- (2) Specification of the length of the bond;
- (3) The requirements for notice of defect or lack of maintenance, and
- (4) A provision for release of the bond.

(e) Bonds shall remain in effect until one (1) year after the final notice of termination for the project is issued by the department. If after one (1) year the erosion controls and post-construction hydrology do not meet the permit and Water Quality Control Act requirements, the bond will default to the appropriate authorities.

(f) Fees for probationary permits shall include an additional maintenance fee for expenses necessary to process the application and monitor the project over the life of the permit, including but not limited to the cost of administration, inspections, water sampling and lab analysis, and other environmental services.

(g) After one (1) successful year of exercising probationary permits for a new vendor and three (3) years for an enforcement-related probationary permit applicant, the commissioner may change the applicant to a priority applicant.

(h) After five (5) years of permits without a permit violation a probationary permit holder shall become a priority applicant.

SECTION 5. The commissioner shall not process or issue permits, permit renewals, or coverage to applicants that are in violation of the Water Quality Control Act. In addition, the commissioner shall not issue, amend, or renew permits, registrations, certifications, or licenses to an entity or person who is delinquent on penalties, fees or remediation efforts.

SECTION 6.

(a) The director of the division of water quality control shall deny permit coverage or individual permits to bad actors. The director shall not issue a permit or permit coverage in response to a notice of intent from a bad actor. If an applicant only eligible for probationary permits submits a notice of intent, all fees, monitoring and testing schedules and other elements of a probationary permit will attach.

(b) In addition to the causes for which the commissioner of the division of water quality control can revoke, suspend or modify any permit for cause listed in § 69-3-108(f) other causes include:

(1) Has obtained a permit as an agent of an individual or company not eligible for such permit due to its non-compliance status; or

(2) Comes under control of an ineligible party due to circumstances such as merger, acquisition or contract.

SECTION 7.

(a) In an effort to reduce the burden on taxpayers by funding enforcement and creating deterrence to future violations certain civil penalties shall be mandatory, including:

(1) The amount calculated with the environmental protection agency benefit (BEN) model to recover the violator's economic benefits of noncompliance from delaying or avoiding pollution control expenditures; and

(2) Reimbursement of department employees' time for investigating complaints, travel, site visits, testing, writing notices of violation, preparing for and attending compliance meetings or other enforcement-related meetings, and preparation and other reasonable expenses incurred to document and seek correction of the violation;

(3) A percentage of the maximum civil penalties that are imposed, with the percentage depending on the number of enforcement actions initiated in the past three hundred sixty-five (365) days, as follows:

(A) First enforcement – at least fifty percent (50%) of the maximum penalty for at least one (1) day of the violation for each violation;

(B) Second enforcement -- at least seventy-five percent (75%) of the maximum penalty for at least one (1) day of the violation for each violation; and

(C) Third or more enforcement actions – one hundred percent (100%) of the maximum penalty for at least one (1) day of the violation for each violation.

(4) For violations on 303(d) listed streams or their tributaries that have continued unabated for more than thirty (30) days, the mandatory civil penalty shall be at least twenty-five thousand dollars (\$25,000).

(b) A plea by the violator of financial inability to prevent, abate, or control pollution shall not be a valid defense under the provisions of this part.

(c) Documentation of the same violation at the same location on two (2) dates creates a rebuttable presumption that the violation continued each day between such dates, and each day since such dates. Civil penalties imposed may reflect the maximum penalty for each day in that range. A violator may rebut this presumption with clear and convincing evidence of supplies, receipts for labor costs, and photographic evidence including proof of the date the photos were taken.

SECTION 8.

(a) The board shall adopt regulations that estimate the expense of water quality testing, site visits, compliance review meetings, appeals, and all other environmental services and administrative expenses related to monitoring, enforcement, settlement, or other compliance activities related to permit processing or enforcement for the purposes of creating a cost list for maintenance fees and other environmental services provided in response to permit applications and violations.

(b) The department shall use this cost list throughout the state to efficiently, consistently and fairly shift the cost of monitoring and compelling compliance to permit holders and other actors that violate clean water laws. The list will also provide a foundation for assessing fees for permit applicants based on the estimated resources that will be expended by the department.

(c) Probationary permit applicants shall pay yearly maintenance fees. Maintenance fees shall equal the added expenses beyond the evaluation and

monitoring of priority applicant permits and shall be collected in advance for the expected term of the project. If a project is not completed within the expected term, the applicant shall pay maintenance fees until a notice of termination is filed with and approved by the commissioner. Extension fees shall be paid in advance for a term of at least six (6) months and are not refundable.

SECTION 9.

(a) The commissioner shall proceed to a director's or commissioner's order enforcement action if the condition persists after two (2) notices of violation for the same or similar violation on a site. This section shall not limit the initiation of enforcement actions relative to the condition.

(b) Whenever the commissioner believes that a violation of any provision of this part or regulation promulgated thereunder or orders issued pursuant thereto has occurred or is occurring, the commissioner shall cause a written complaint to be served upon the alleged violator or violators. This action in no way limits any other enforcement actions related to the violation.

SECTION 10. Tennessee Code Annotated, Section 69-3-103, is amended by adding the following new items thereto:

() "Applicant" means any person making application for the approval of a permit pursuant to the water quality control act;

() "Bad actor" means an applicant that:

(A) Received an enforcement action for one or more permit violations or activities that legally required a permit or otherwise violated the Water Quality Control Act while eligible only for probationary permits due to a history of non-compliance;

(B) Has a documented history of disregard of permit requirements evidenced by five (5) or more enforcement actions initiated within a three hundred sixty-five (365) day period or eight (8) notices of violation statewide or a series of incidents demonstrating a disregard for environmental regulations or a pattern of prohibited conduct.

(C) Regardless of eligibility, has been charged with, or incarcerated for, an environmental criminal offense or fraud within three (3) years preceding the application for a permit,

(D) Has been found by the department to have caused significant harm through a disregard of permit requirements or other violation of the Water Quality Control Act; or

(E) Has received a stop work order in the last year;

() "Compliance history" means any record of being a responsible party found to have violated the Clean Water Act in Tennessee or any other state or the Water Quality Control Act of 1971 including notices of violations, complaints, enforcement actions, agreed orders, commissioners orders, or other such actions;

() "Enforcement action" means commissioner's orders, director's orders, and expedited director's orders for Water Quality Control Act or Clean Water Act violations for permitted activities or for failing to have a permit when necessary. Enforcement actions are considered in the aggregate, not by individual permit or site.

() "Priority applicant" means an applicant who is eligible for priority permits and associated fee schedules at the time the permit application is complete due to a history of compliance evidenced by a lack of violations of the Clean Water Act, Water Quality Control Act, or other environmental law;

() "Responsible party" means:

(A) Any individual who is an applicant, an officer or director of a corporation, partnership, or business association that is an applicant, or person with overall responsibility for operations of the site required to have a construction stormwater or other permit; or

(B) Any official or management committee member of the state or political subdivision thereof that is an applicant;

SECTION 11. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 12. This act shall take effect July 1, 2007, the public welfare requiring it.